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No. 82-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORA ACKERMAN, as Superintendent;
FORT WAYNE STATE HOSPITAL AND TRAINING
CENTER, an Instrumentality of the
State of Indiana
Petitioners,

v.

HAROLD DELESSTINE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not replacing a discharged black male with a white female serves as a complete defense to a charge of racial discrimination pursuant to 42 U.S.C. §2000-e by depriving the discharged party of the right to make a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2. Whether or not a party may seek a writ of certiorari to challenge the credibility determinations and fact findings of the District Court, as affirmed by a Court of Appeals, without any allegation of legal error.

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SUMMARY OF ARGUMENT

The "facts" which the Petitioners seek to use as a basis for review are not found in the opinions of the courts below. Rather than relying upon the facts as found by the District Court, and affirmed by the Seventh Circuit Court of Appeals, Petitioners base their request for issuance of a writ of certiorari on testimony which was not found as fact by the lower courts.

Petitioners' legal argument is that replacing a discharged black male with a white female destroys a *prima facie* case of racial discrimination, thus preventing any claim of racial discrimination. Respondent contends that this argument is totally unsupported by any citation to any legal authority whatsoever and is totally inconsistent with the history and purpose of Title VII of the 1964 Civil Rights Act.

Respondent also argues that Petitioners' allegation that their defenses were "ignored" by the Seventh Circuit Court of Appeals is nothing more than an attempt to relitigate facts that were found against them at both the District Court and the Seventh Circuit Court of Appeals. Such an attempt to re-argue the facts is not a proper ground for issuance of a writ of certiorari.

ARGUMENT

I.

THE "FACTS" RECITED BY PETITIONERS ARE NEITHER THOSE FOUND BY THE DISTRICT COURT NOR THOSE AFFIRMED BY THE SEVENTH CIRCUIT COURT OF APPEALS

A great difference emerges between what the District Court actually found as facts and that which the Petitioners would have this Court believe. Apparently, Petitioners attempt to highlight the testimony most favorable to their position rather than focusing upon any allegation of legal error based upon the facts as found by the District Court. Each appellate court must apply the "clearly erroneous" standard to the findings of the District Court under *Fed. R. Civ. P.* 52(a). *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 365 U.S. 100 (1969).

The facts as found by the District Court are contained at (A 16-26) of the Petition for Certiorari. The Seventh Circuit Court of Appeals discussion of the facts is found at (A 5-11).

A number of examples of Petitioners' purported "facts" are sufficient to make the point. Petitioners suggest that Respondent was physically able to return to work, the fact is he was not (A-23); Petitioners suggest Respondent could have worked, the fact is Dr. Ackerman imposed conditions upon Respondent's return which Dr. Ackerman knew could not be fulfilled (A-23). The fact is Respondent's surgeon explained the consulting employment to Petitioners (A-23) and invited inquiry from the Petitioners (A-22) which Petitioners totally ignored.

At page 3 of their Petition, Petitioners contend that a July 16, 1974, telephone conversation between Dr. Sirlin and Dr. Towles resulted in Dr. Sirlin recalling "a negative response from respondent's physician concerning permission to work, a position which Dr. Sirlin

indicated to Petitioner Ackerman by written report". The District Court found (A 22-23) that Dr. Sirlin's "recollection" was thoroughly discredited by Dr. Towles to the point where the Court of Appeals felt compelled to indicate that Dr. Sirlin's testimony amounted to a "fabrication of the facts" (A-11).

As a result of its findings, the District Court found that respondent, by virtue of his race, belonged to a protected class, was qualified for the position from which he was terminated, that despite his qualifications he was terminated, and that after his termination his position was filled by a white male on an interim basis, and then by a white female on a permanent basis. The District Court concluded from the foregoing facts that respondent had proven a case of discrimination. A divided Seventh Circuit Court of Appeals affirmed these findings.

II.

PETITIONERS HAVE NOT SHOWN THE SEVENTH CIRCUIT COURT OF APPEALS' OPINION TO BE IN CONFLICT WITH ANY DECISION OF THIS COURT

Petitioners suggest that Supreme Court Rules 17.1 (b)[1] and (c) serve as the jurisdictional basis for this Court's review. As a result, it is incumbent upon them to show a conflict with applicable decisions of this Court. Petitioners have not done so for the simple reason that no court of this country at any level has ever upheld the basic proposition which petitioners argue; that proposition being the replacement of a black male with a white female serves as a complete defense[2] to a charge of *racial* discrimination. This proposition seems so completely at odds with any understanding of Title VII of the 1964 Civil Rights Act[3] that the Seventh Circuit Court of Appeals was moved to brand it "nonsensical". (A-5,n.4)

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[1]Since this case originated in The United States District Court for the Northern District of Indiana, Fort Wayne, Division, Respondent is at a loss to see how Rule 17.1 (b) gives this court jurisdiction.

[2]By denying a plaintiff the opportunity to make a *prima facie* case, thus foreclosing any review of the employer's reason for the discharge.

[3]42 U.S.C. §2000-e *et. seq.*

Petitioners' so-called "standard" test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is anything but "standard", as this Court noted in the *McDonnell Douglas* decision 411 U.S. at 802 n. 13. The *McDonnell Douglas* test shifts and adapts depending upon the type of case involved. *McDonnell Douglas* was a failure to hire case. This case calls for a slightly different standard. The accepted standard in a racially motivated discriminatory discharge case was enunciated by the Seventh Circuit Court of Appeals in the case of *Flowers v. Crouch-Walker*, 552 F. 2d 1277 (7th Cir. 1977), when it held that the appropriate *prima facie* test for a case of racially discriminatory discharge was:

> 1. That the plaintiff was a member of a racial minority.
>
> 2. That he was qualified for the job which he was performing;
>
> 3. That he was satisfying the normal requirements in his work;
>
> 4. That he was discharged; and
>
> 5. That after his discharge the employer assigned *white* employees to do the same work. (552 F. 2d at 1282) *(Emphasis added)*.

The *Flowers*, *supra*, test has gained wide acceptance in the courts of this country, and has not been repudiated.

A review of the facts shows that each of the prerequisites for a *prima facie* case of racially discriminatory discharge was present in this case. The total absence of any case authority at any level across the nation supporting the Petitioners' legal theory means that the Petitioners have not shown that the Seventh Circuit's opinion was in conflict with any decision of any court, let alone any decision of this Court.

Petitioners' argument is repugnant to the concept of racial equality and harmony. The Petitioners' suggestion that employment of a white woman necessarily

precludes racial animus is contradicted by centuries of history. If the Petitioners suggest that such employment does not preclude racial animus, but rather only immunizes it from redress by the aggrieved Respondent, then Petitioners plunge racial minorities into an antebellum lack of rights, self-esteem, and social mobility.

III.

THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS CLEARLY REJECTED PETITIONERS' REASON FOR DISCHARGING RESPONDENT AS A PRETEXT

Petitioners claim that their defense was "ignored" by the Seventh Circuit. On the contrary, the Seventh Circuit spent nearly three full pages (A-9, 10, & 11) thoroughly analyzing Petitioners' alleged "nondiscriminatory" reason and rejected the same as being an obvious pretext. The Seventh Circuit Court of Appeals labeled the proof and testimony of the petitioners on this issue as "appellants' fabrication of the facts and the utter disregard of information at their disposal relevant to appellee's conduct" (A-11).

Petitioners simply seek to have this Court re-weigh the evidence with regard to the validity of their defense. This is something the Court may not do.

Petitioners protest that the numerical analysis of their work force was ignored. This Court has held any number of times that a racially balanced work force does not serve as a complete defense to a charge of race discrimination. See, *Furnco Const. Corp. v. Waters*, 438 U.S. U.S. 562 (1978); *Teamsters v. United States*, 431 U.S. 324 (1977). Earlier this year, this Court held that neutral or nondiscriminatory statistics do not establish a complete defense even when a claim is one under the *Griggs*[4] disparate impact theory. *Connecticut v. Teal*, - U.S. - 73 L. Ed. 2d 130 (1982). Petitioners'

[4] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

defenses were given a thorough review by both the District Court and the Court of Appeals and found to be wanting on the facts of this case.

IV.

CONCLUSION

The only legal argument Petitioners make is the assertion, without citation of authority, that replacing a black male with a white female destroys a *prima facie* case of *racial* discrimination. Other arguments made by Petitioners simply beg for the Court to re-weigh the evidence, not based upon the facts found by the District Court and affirmed by the Seventh Circuit Court of Appeals, but rather from testimony which Petitioners apparently wish the lower courts had found as fact.

Petitioners' novel assertion of legal error is so completely contrary to a reasonable interpretation of Title VII the 1964 Civil Rights Act as to give this Court no reason to grant certiorari. This Court should clearly not grant certiorari for the rest of Petitioners' asserted "errors" since they are clearly nothing more than an attempt to relitigate facts already decided against them.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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